

1662. June 19.

ISOBEL DRUMMOND against JEAN SKEEN.

No 6.

ISOBEL DRUMMOND pursues Jean Skeen, as behaving herself as heir to her brother James Skeen, by uplifting the mails of the lands, wherein he died infest, to fulfil her contract of marriage with James. The defender *alleged*, Absolvitor; because she uplifted those duties by virtue of her infestment, being served heir to John Skeen, son to James Skeen, the pursuer's debtor, who was infest, not as heir to his father James, but as heir to her goodsire. The pursuer *answered*, In respect to the defender's sasine, or to John Skeen's, which were evidently null, seeing James Skeen was infest, and so John could not pass over him to his goodsire; and if any regard were had to such infestment, it would open a door to all fraud, and abstracting of defunct's creditor's evidents.

THE LORDS found the defence relevant to purge this vitious passive title, seeing the failzie was not in this defender, but in John Skeen, his brother's son, but prejudice to reduce as accords; but ordained her to renounce to be heir to James, that adjudications might be obtained.

*Stair, v. 1. p. 111.*

1663. February 21.

HARY HAMILTON against WILLIAM HAMILTON.

No 7.

HARY HAMILTON pursues his brother William, as behaving himself as heir to their father, John Hamilton, apothecary, to pay 6000 merks of provision by bond, and condescends that William intromitted with the rents of the lands of Ulistobe, whereunto his father had heritable right. The defender *answered*, That his father was not infest; because he infest the defender therein before his death, reserving only his own liferent. The pursuer *answered*, That the infestment was under reversion, and was redeemed by the father, which order, though not declared, gave him the right to this land, and was more than equivalent to an heritable disposition, clad with possession, which would make the apparent heir's intromitting infer behaving as heir, for the declarator *non constituit sed declarat jus constitutum*.

THE LORDS repelled the defence and duply, in respect of the condescendence, and reply of the order used.

*2dly*, The defender *alleged*, Absolvitor; because those lands were appraised from the defunct, and thereby he was denuded; and so the defender could not be heir therein, at least he could have nothing but the right of reversion, which reacheth not to mails and duties.

THE LORDS found, that, unless the defender had title, or tolerance from the appriser, the legal not being expired, but the debtor in possession, his heir in-

An apparent heir intromitting with the rents of lands, which had been wadset by the defunct, but which were redeemed by him, and in his possession at his death, though there was no declarator of redemption, was found to infer behaviour. It was also found behaviour, that the apparent heir intromitted with rents of lands appraised from the defunct, but of which the legal was not expired.

No 7. tromitting, behaved as heir, the apprising being but a security, of which the appriser might make no use, or but in part, as he pleased.

*Fol. Dic. v. 2. p. 27. Stair, v. 1. p. 185.*

No 8.

1663. February 21. STIRLING against CAMPBELL.

THE same last point was found betwixt these parties, and also that the heir's intromission with the whole silver-work, so comprehending the best of them, which is the heirship, was *gestio pro hærede*.

*Fol. Dic. v. 2. p. 27. Stair, v. 1. p. 185.*

No 9.

1667. January 16. REID against SALMOND.

REID pursues Barbara Salmond and James Telzifer, her husband, for a debt due by her father, as behaving herself as heir, by possessing a house wherein her father died infest, and by setting another house of his to tenants. It was *answered*, That James Telzifer was tenant in the house possessed by him, before the defunct's death, and might possess, *per tacitam relocationem*; neither could he safely leave the house, till he had given it over to some having right.

Which the LORDS found relevant.

*2dly*, It was *alleged*, That the defunct had disposed the same tenement to the defender's son, his oye, which disposition, albeit it attained not infestment, yet it was a sufficient title for mails and duties, and to continue possession, and to purge the vitious title of behaving as heir.

Which the LORDS found also relevant.

*Stair, v. 1. p. 427.*

No 10.

1671. July 11. MAXWELL against MAXWELL.

WHERE the appriser was infest and in possession, and the defunct not in possession, the apparent heir's intromission with the rents was found not *gestio pro hærede*.

*Fol. Dic. v. 2. p. 27. Stair.*

\* \* \* This case is No 50. p. 5306. *voce* HEIR APPARENT.